Clinan v. *Cooke* (1802) 1 Sch. & Lef. 22; *France* v. *Dawson* (1807) 14 Ves. 386; *Eaton* v. *Whittaker* (1846) 18 Conn. 222; *Webster* v. *Blodgett* (1879) 59 N. H. 120. But their former position as regards the taking of possession has not been so readily abandoned. To meet new theories it has been strained by specious reasoning, such as that the grantee, who to protect himself from actions of trespass, must be allowed to prove the agreement, cannot be prevented from proving it for all purposes, *Bond* v. *Hopkins*, supra; *Keats* v. *Rector*, supra, or that the mere refusal to perform such agreement is in itself fraudulent. *Morphett* v. *Jones* (1818) 1 Swans. 172. Other courts have been led to the adoption of rules more or less arbitrary, New York having held that, while it would seem possession alone is not sufficient, possession coupled with a payment of purchase price will be so considered. *Dunckel* v. *Dunckel* (1894) 141 N. Y. 427; *Miller* v. *Ball* (1876) 64 N. Y. 287.

A recent case in New York, embodying all the elements essential to any of these positions, is interesting as showing their inconsistency with the theory that fraud is the ground of the relief granted in such cases. *Czermak* v. *Wetzel* (1906) 100 N. Y. Supp. 167. It was there held that where after a parol lease when a part of the price was paid, there was a dispute and the lessee took possession in the face of the disagreement, the Statute of Frauds was a bar to specific performance. Here were the requirements of the New York rule—possession taken with the consent of the owner and clearly referable to an agreement, see Pomeroy, Spec. Perf. §116; *Lord* v. *Underdunck* (N. Y. 1843) 1 Sandf. Ch. 46, with a payment of purchase price. The court, led by the clear lack of equity to refuse relief, was forced into the position that there had been no taking of possession under this agreement, because the later dispute between the parties had rendered it void. It is well established that though a parol agreement of this sort may be unenforceable, it is not void, *Leroux* v. *Brown* (1852) 12 C. B. 801, 824, even when there is a subsequent disagreement as to its terms. *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123, 132. Yet the result of the case, unsupportable as it is on such a ground, stands out as clearly correct when the true theory is applied. If the essential fact, that the plaintiff has been put into a position which is a fraud upon him unless the agreement is fully performed, 2 Story, Eq. Jur. §761, is made to control, it is only when an irretrievable change of position has been induced that equity should act. This is often the case where the plaintiff has taken possession under certain circumstances. *Potter* v. *Jacobs* (1872) 111 Mass. 32. But where the entry is made in the face of a disagreement, the grantee has clearly no equity to invoke. In such cases adherence to the old standards must frequently result in either the improper granting of equitable relief or the perversion of settled rules of law.

THE NATURE OF THE ACT IN CRIMINAL ATTEMPTS.—The complete perpetration of a crime is often rendered impossible by some circumstance unknown to the offender which, while it by no means lessens the criminal nature of his intention, may enable him to escape either partially or entirely from the liability which he would have incurred but for the

unforeseen impediment. A common instance is found in the pickpocket cases where the crime of larceny is rendered impossible of commission by the absence of property in the pocket, a fact of which the wrongdoer was necessarily ignorant until he made his attempt. It is now no longer questioned that such parties may be convicted of an attempt to commit larceny; the acts performed in the furtherance of their criminal design tend toward the commission of the crime. They are a menace to public security, and society demands protection from such attacks. *State* v. *Wilson* (1862) 30 Conn. 500; *People* v. *Moran* (1890) 123 N. Y. 254. And see *Clark* v. *State* (1888) 86 Tenn. 511. The situation of the pickpocket in these cases is very closely analogous to that of one who has entered the dwelling of another with the intention of committing a felony but is prevented in some way from the complete perpetration of his design. The difference is simply one of degree, the acts in the latter case being recognized as so exceedingly pernicious and dangerous to society that the law has elevated this attempt to the position of a substantive crime. *State* v. *Wilson* (N. J. 1793) Coxe 439. But when the acts of the offender constitute no substantive offence of this sort, to make the attempt amenable to the law the act must in some way be injurious to the public, prohibited by law or so criminal in its tendency as to demand that society be protected from it. 1 Whart., Crim. Law (10th Ed.) §186. Thus, when by statute certain acts with intent to procure the miscarriage of a woman are made criminal, it seems perfectly clear that the protection of society demands that the attempt to commit the crime by means of these acts should be punishable, even though the woman was not in fact pregnant, and the principle of the pickpocket cases appears directly applicable. *Commonwealth* v. *Taylor* (1882) 132 Mass. 261.

If, however, in the consummation of his criminal purpose the wrongdoer "accomplishes neither the wrong meant nor anything else of a publicly injurious nature" he has committed no offence. 1 Bishop N. C. Law §438, and cases cited. A decision recently rendered by the Court of Appeals in New York draws some careful and accurate distinctions in this class of cases. The defendant was indicted for feloniously receiving property, knowing it to be stolen. He had bought the goods believing them to be stolen, but it was conceded upon the trial that the property in question had been recovered by the owner and consequently had lost its character as stolen goods when sold to the defendant for the purpose of entrapping him. The judgment of the lower courts convicting the accused of an attempt to commit the crime was reversed and defendant was discharged upon the indictment. *People* v. *Jaffe* (1906) 78 N. E. 169. The decisive point here was that the defendant "could do no act which was intrinsically adapted to the successful perpetration of the crime." Similarly, it has been held that an adherence to American troops, under the supposition that they were the enemy, did not amount to treason. *Respublica* v. *Malin* (Pa. 1778) 1 Dall. 33. The precise principle involved in this New York case is perhaps limited to a comparatively small class of offences—where some essential element of the offence intended to be committed is totally lacking. But the test it lays down is the proper one; the act itself must be intrinsically efficient

to produce the effect intended, and then if something extrinsic to the act prevents its success, the offence is, nevertheless, complete as a criminal attempt. *Commonwealth* v. *Jacobs* (Mass. 1864) 9 Allen 274; Clark v. *State* (1888) 86 Tenn. 511. See also XVI HARVARD LAW REVIEW 497.

STATUS OF BAGGAGE OF WHICH CONTROL IS RETAINED BY PASSENGER. —Whatever the exact sources of the liability of a common carrier for goods in his possession under a bailment (see Holmes Common Law, 180 et seq.) there is no question as to the development of that branch of the law since *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909. The reasons there laid down by Lord Holt, that the policy of the law has imposed the responsibility of insurers for the better protection of the travelling public against fraud and collusion with highwaymen, though not mentioned in the earlier cases declaring such liability, *Woodlife's Case* (1597) Moore 462; *Rich* v. *Kneeland* (1613) Hob. 18, has been accepted in subsequent opinions. These reasons, together with the additional suggestion of Lord Mansfield in *Forward* v. *Pittard* (1785) 1 T. R. 27, 33, of the difficulty of proving that a carrier has failed in any duty less stringent than that of an insurer, may be said fairly to represent the grounds upon which the modern liability of carriers has been developed as regards freight.

In the matter of the carrier's liability for ordinary baggage, some confusion has existed owing to loose comparisons with the customary duty of innkeepers, *Nudgett* v. *Bay State Steamboat Co.* (1861) 1 Daly 151. Yet the authorities seem to show that the source of this responsibility is identical with that for freight, both doctrines being an outgrowth of the law of bailments, developed under the same necessity of protecting the bailor from fraud and collusion. *Powell* v. *Myers* (1841) 26 Wend. 591. The decisions contemporary with *Coggs* v. *Bernard*, supra, refused to recognize any liability at all for baggage, where there was not a distinct bailment supported by a separate consideration. *Middleton* v. *Fowler* (1698) 1 Salk. 282; *Upshare* v. *Aidee* (1696) 1 Comyns 25. Later, although the necessity of a separate payment was abandoned for the theory that the consideration was included in the fare of the passenger, *New Jersey Steam Nav. Co.* v. *Merchants' Bank* (1848) 6 How. 344, the underlying idea remained unchanged. *Gleason* v. *Goodrich Trans. Co.* (1873) 32 Wis. 85. The resulting closeness of connection with the carriage contract of the passenger has resulted in a restriction of the character of the goods to be carried, *Jordan* v. *Fall River R. R. Co.* (1849) 5 Cush. 69, and of the length of time after arrival at destination that the carrier's special duty continues. *Chicago R. I. & P. R. R. Co.* v. *Boyce* (1874) 73 Ill. 510. But despite these attendant differences, the basis of the liability for baggage proper is still, like that for freight, the delivery of goods to a bailee.

The law with regard to the third class of goods for which a carrier incurs liability, namely the articles which the traveller retains in his own possession, is clouded with uncertainty and embarrassed by conflicting decisions. Cases are to be found holding the carrier, in respect of such articles, to liability as an insurer, *Walsh* v. *The H. M. Wright* (1854) Fed.